



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Air Transport Association

File: B-278621

Date: February 19, 1998

Warren L. Dean, Jr., Esq., Patricia N. Snyder, Esq., Wayne A. Keup, Esq., and Heather Miller, Esq., Dyer, Ellis & Joseph, for the protester. Jonathan S. Baker, Esq., Environmental Protection Agency, for the agency. Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

A procurement for support services for the evaluation of jet aviation emissions was properly set aside exclusively for small business participation where the contracting officer reasonably determined that submission of offers reasonably could be expected from at least two responsible small business concerns at a fair market price.

DECISION

Air Transport Association protests request for proposals (RFP) No. XX7001, issued by the Environmental Protection Agency (EPA) as a small business set-aside for support services for the evaluation of jet aviation emissions. Air Transport protests the small business set aside and other terms of the RFP.

We deny the protest in part and dismiss it in part.

The RFP, issued on October 27, 1997, by publication in the Commerce Business Daily, contemplated the award of a firm, fixed-price contract for two tasks. Task 1 was for the review of information and the preparation of a working paper report concerning fuel use and nitrogen oxides trade-off issues based on engine designs. Task 2 was for the research of information on high speed civil transportation and the preparation of a memo discussing likely scenarios of environmental impacts relating to engine design. The RFP stated that delivery of a draft working paper for Task 1 would be required within 4 weeks of award, and delivery of the final working paper would be required within 2 weeks of the contractor receiving EPA's written comments on the draft. The delivery date for a draft memo for Task 2 was January 30, 1998, and delivery of a final memo was required within 1 month of the contractor receiving EPA's written comments. The government estimate for the procurement was \$40,000.

The RFP stated that the award would be made using simplified acquisition procedures under Federal Acquisition Regulation (FAR) Subpart 13, and that the procurement was set aside exclusively for small business participation. Proposals were due and submitted on November 13. Air Transport did not submit a proposal.

Immediately prior to the time set for submission of proposals, Air Transport, which is not a small business concern, protested the delivery terms for Task 1 and the small business set-aside, alleging that the requirements for the draft working paper cannot be performed within 4 weeks, particularly by a small business concern. Air Transport also alleges that the Task 1 requirements cannot be performed for less than \$100,000 and, to the extent the agency contends that its actual minimum needs can be performed for less than that amount, the agency has relaxed the RFP requirements without amending the RFP. Air Transport also protested the terms of the conflict of interest provision in the RFP.

Under FAR § 13.105(a), an acquisition with an estimated value exceeding \$2,500 and not exceeding \$100,000 is reserved exclusively for small business concerns and shall be set aside in accordance with Subpart 19.5. FAR § 19.502-2(a) states, in relevant part, that a set aside of such acquisition is automatic unless:

the contracting officer determines there is not a reasonable expectation of obtaining offers from two or more responsible small business concerns that are competitive in terms of market prices, quality, and delivery.

As a general rule, the decision as to whether to set aside a particular procurement is within the discretion of the contracting agency. Aspen Sys. Corp., B-272213.2, Oct. 22, 1996, 96-2 CPD ¶ 153 at 3. We will not question a set-aside decision unless an abuse of discretion is clearly shown. ARO Corp., B-231438, July 22, 1988, 88-2 CPD ¶ 74 at 2.

Here, the government estimate was well within the \$2,500 to \$100,000 range. This estimate was based on EPA's past experience acquiring similar services. Although Air Transport generally disagrees that the RFP requirements could be performed for less than \$100,000, it has not provided any evidence to support this general allegation. Even assuming, as the protester alleges, that more services were required by the terms of the RFP than were reflected in the agency's estimate, Air Transport has not provided any evidence to show that such additional services reasonably could be expected to increase the estimated value of this procurement to exceed \$100,000.¹ Moreover, even assuming the RFP requirements have been

¹For example, the protester alleges that the RFP's detailed description of the content of the working paper implies that the contractor must develop and apply
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relaxed after submission of proposals, which the record does not confirm, this would tend to show that the services can be obtained for less than the amount which Air Transport initially believed they would cost and, apparently, for less than \$100,000. Thus, Air Transport has not shown that FAR §§ 13.105(a) and 19.502-2(a) are not applicable to this RFP.

Nor did the agency abuse its discretion in determining that a reasonable basis existed to expect offers from at least two capable small business concerns. The contracting officer determined, based on information provided by the project manager, that there was a reasonable expectation of receiving offers from two small business concerns. The project manager had discussions with technical personnel experienced with jet fuel emissions from the Federal Aviation Administration, the National Aeronautic and Space Administration, and EPA's Office of Mobile Sources concerning the existence of small business concerns capable of performing the work at a fair market price; two small business concerns were identified.

The protester has not suggested that either of the two concerns identified was not a small business, or did not have the experience, expertise or other capabilities necessary to perform the stated requirements in the required time period. In fact, the protester provided no evidence to support even its general allegation that no small business concern can perform the protested requirements in the 4-week period required for delivery of the draft working paper.

Based on the record before us, EPA's decision to set aside the RFP for exclusive participation by small business concerns was reasonable and not an abuse of its discretion.

Since Air Transport is not a small business concern and because this RFP was properly set aside for small business, Air Transport is not an interested party eligible to protest the other terms in the RFP. Under the bid protest provision of the Competition in Contracting Act of 1984, 31 U.S.C.A. §§ 3551-3556 (West Supp. 1997), only an interested party may protest a federal procurement. That is, a protester must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a) (1997). A protester is not an interested party where it would not be eligible for contract award were its protest to be sustained. ECS Composites, Inc., B-235849.2, Jan. 3, 1990, 90-1 CPD ¶ 7. Since Air Transport is not

¹(...continued)

complex modeling techniques. Although the RFP does not state that any modeling techniques must be used, and the agency states that none are required, even if we assume for the sake of argument that they are required, the protester has not provided any evidence to show the estimated cost of, or time required for, using such models.

a small business concern, it is ineligible for award under this solicitation and is thus not an interested party for the purpose of challenging the remaining terms of the RFP. ARO Corp., supra, at 2.

The protest is denied and, in part, dismissed.

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